

URGENCY ORDINANCE NO. 2021-05

AN URGENCY ORDINANCE OF THE CITY OF COSTA MESA ESTABLISHING TEMPORARY PREMIUM PAY FOR GROCERY WORKERS AND DECLARING THE ORDINANCE TO BE AN EMERGENCY MEASURE TO TAKE EFFECT IMMEDIATELY UPON ADOPTION

WHEREAS, the City of Costa Mesa, pursuant to its police power, may enact regulations for the public peace, morals, and welfare of the City; and

WHEREAS, on March 4, 2020, the Governor declared a State of Emergency in California due to the threat of Coronavirus Disease 2019 ("COVID-19"). On February 26, 2020, the Orange County Board of Supervisors and Department of Public Health declared a public health emergency in Orange County due to COVID-19. On March 12, 2020, pursuant to Proclamation No. 2020-01, the City Manager did proclaim the existence of a local emergency pursuant to Title 6 of the Costa Mesa Municipal Code, and on March 13, 2020 the City Council pursuant to Resolution No. 2020-9 did ratify Emergency Proclamation No. 2020-01. Due to directives from federal, state, and local health officials, residents have been ordered to avoid public gatherings and periodically to stay at home to prevent the spread of this disease; and

WHEREAS, on March 19, 2020, California Governor Gavin Newsom issued a "Stay Home - Stay Healthy" proclamation closing all non-essential workplaces, requiring people to stay home except to participate in essential activities or to provide essential business services, and banning all gatherings for social, spiritual, and recreational purposes. In addition to healthcare, public health and emergency services, the "Stay Home - Stay Healthy" proclamation identified grocery stores as essential business sectors critical to protecting the health and well-being of all Californians and designated their workers as essential critical infrastructure workers; and

WHEREAS, as of March 10, 2021, there have been over 524,000 deaths due to COVID-19 across the country, including 116 in Costa Mesa; and

WHEREAS, the COVID-19 virus has broadly spread throughout California and remains a significant health risk to the community, especially members of our most vulnerable populations; and

WHEREAS, grocery and drug retail workers face increased exposure risk due to inability to consistently practice physical distancing in the workplace, with researchers in Massachusetts reporting that employees with direct customer exposure were five times more likely to test positive for the COVID-19 virus than those employees without such exposure; and

WHEREAS, frontline grocery and drug retail workers have been unable to work from home, including those with children engaged in distance learning, and have therefore likely incurred additional childcare expenses; and

WHEREAS, Orange County is currently vaccinating people in Tier 1A, frontline grocery and drug retail workers are listed in Tier 2 for Orange County's COVID-19 vaccination plan, and distribution to people in Tier 2 is not anticipated to be completed in Orange County until Spring 2021; and

WHEREAS, during the early stages of the COVID-19 pandemic, many grocery companies provided "Hero Pay," which was generally implemented as either a temporary hourly wage increase or a one-time bonus for certain essential workers; and

WHEREAS, Hero Pay has generally phased out or terminated; however, according to the Brookings Institute, the top retail companies earned on average an extra \$16.7 billion in profit in 2020 compared to 2019; and

WHEREAS, premium pay, paid in addition to regular wages, is an established type of compensation for employees performing hazardous duty or work involving physical hardship that can cause extreme physical discomfort and distress; and

WHEREAS, grocery and drug retail workers working during the COVID-19 pandemic merit additional compensation because they are performing hazardous duty due to the significant risk of exposure to the COVID-19 virus. Grocery and drug retail workers have been working under these hazardous conditions for months. They are working in these hazardous conditions now and will continue to face safety risks as the virus presents an ongoing threat for an uncertain period, potentially resulting in subsequent waves of infection; and

WHEREAS, the availability of grocery and drug retail stores is fundamental to the health of the community and is made possible during the COVID-19 emergency because grocery and drug retail workers are on the frontlines of this devastating pandemic supporting public health, safety, and welfare by working in hazardous situations; and

WHEREAS, many grocery and drug retail workers have had their higher safety risks exacerbated by lax enforcement of capacity limits and mask requirements in grocery and drug retail stores; and

WHEREAS, establishing an immediate requirement for grocery and drug retail stores to provide premium pay to grocery and drug retail workers protects public health, supports stable incomes, and promotes job retention by ensuring that grocery and drug retail workers are compensated for the substantial risks, efforts, and expenses they are undertaking to provide essential services in a safe and reliable manner during the COVID19 pandemic; and

WHEREAS, the City Council has carefully reviewed and considered all of the evidence, including the staff report and public comments presented; and

WHEREAS, this Ordinance is exempt from the requirements of the California Environmental Quality Act ("CEQA") pursuant to State CEQA Guidelines, as it is not a "project" and has no potential to result in a direct or reasonably foreseeable indirect physical change to the environment because it is merely the formation of an organization. (14 Cal. Code Regs. § 15378(a).) Further, this Ordinance is exempt from CEQA because there is no possibility that this Ordinance or its implementation would have a significant negative effect on the environment. (14 Cal. Code Regs. § 15061(b)(3).) The City Clerk shall cause a Notice of Exemption to be filed as authorized by CEQA and the State CEQA Guidelines.

WHEREAS, the City Council has the authority to adopt this Ordinance under Government Code Section 8630, California Constitution Art. XI, section 7, and Labor Code section 1205.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF COSTA MESA DOES ORDAIN AS FOLLOWS:

SECTION 1. ADOPTION OF TEMPORARY PREMIUM PAY FOR GROCERY WORKERS.

A. DEFINITIONS. For purposes of this Ordinance, the following definitions apply.

1. "Adverse action" means reducing compensation, garnishing gratuities, temporarily or permanently denying or limiting access to work, incentives, or bonuses, offering less desirable work, demoting, terminating, deactivating, placing on hold status, failing to rehire after a seasonal interruption of work, threatening, penalizing, retaliating, or otherwise discriminating against a grocery worker.

"Adverse action" may involve any aspect of employment, including pay, work hours, responsibilities, or other material change in the terms and condition of employment.

2. "Aggrieved party" means a grocery worker or other person who suffers tangible or intangible harm due to a covered employer or other person's violation of this Ordinance.

3. "Base wage rate" means the regular hourly wage rate paid to a grocery worker.

4. "City" means the City of Costa Mesa.

5. "Grocery worker" means an individual who performs at least two (2) hours of work in a calendar week for a covered employer within the City of Costa Mesa, but does not include managerial, supervisory, or confidential employees of a covered employer.

6. "Covered employer" means any retail establishment, as defined herein, that is located in the City of Costa Mesa, employs at least 15 employees at the retail establishment, and whose owner, parent company, franchisor or network of franchises employs three hundred (300) or more employees nationally. For purposes of this definition, all employees who worked for compensation shall be counted, including but not limited to (a) employees who are not covered by this Ordinance; and (b) employees who worked in full-time employment, part-time employment, joint employment, temporary employment, or through the services of a temporary services or staffing agency.

7. "Hour worked" means the time during which a grocery worker is subject to the control of a covered employer, including any time that the employee is suffered or permitted to work or on-call.

8. "Person" means any individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign.

9. "Premium pay" means an additional \$4.00 per hour wage premium for each hour worked that is in addition to a grocery worker's base pay rate and any commissions, gratuities, bonuses or any other form of regular or premium pay that is owed to the grocery worker, including but not limited to any holiday, overtime, or vacation pay.

10. "Retail establishment" means a retail establishment located in the City of Costa Mesa that: (a) (i) devotes seventy percent (70%) or more of its sales floor area to retailing a general range of food products, which may be fresh or packaged, or (ii) receives seventy percent (70%) or more revenue from retailing a general range of food products; (b) is more than 85,000 square feet and devotes 10% or more of its sales floor area to the sale of merchandise that is non-taxable pursuant to Section 6359 of the Revenue and Taxation Code, including retail establishments with multiple tenants, so long as consumer goods and nontaxable items are sold under the same roof with shared checkout stands, entrances, and exits; or (c) is a retail pharmacy that sells a variety of prescription and nonprescription medicines, as well as any combination of miscellaneous items, including but not limited to sundries, dry foods, packaged foods, beverages, fresh produce, meats, deli products, dairy products, canned foods, or prepared foods.

B. PREMIUM PAY REQUIREMENT.

1. Each covered employer shall pay each grocery worker premium pay consisting of an additional four dollars (\$4.00) per hour for each hour worked.

2. Covered employers shall provide the premium pay required for a minimum of one hundred twenty (120) days from the effective date of this Ordinance.

3. A covered employer that was providing hazard pay to grocery workers at a rate of \$1.00 or more per hour as of the effective date of this Ordinance, and that continues to provide such hazard pay at the same rate while this Article is in effect, may credit the amount of such hourly hazard pay for each hour worked by a grocery worker towards meeting its obligations under this Ordinance.

C. GROCERY WORKER PROTECTIONS.

1. It shall be unlawful for a covered employer to take any of the following actions, as a result of this Ordinance going into effect: (a) Reduce a grocery worker's compensation; (b) Limit a grocery worker's earning capacity.

2. A covered employer violates the prohibition if the requirements of this Ordinance are a motivating factor in the covered employer's decision to take any adverse action, unless the covered employer proves that it would have taken the same action at the time that it did irrespective of the Ordinance's operation.

D. NOTICE OF RIGHTS.

Each covered employer shall provide grocery workers with a written notice of rights established by this Ordinance in a form published by City. The notice of rights shall be in a form and manner sufficient to inform grocery workers of their rights under this Ordinance. The notice of rights shall provide information on: (a) The right to premium pay guaranteed by this Ordinance; (b) The right to be protected from retaliation for exercising in good faith the rights protected by this Ordinance; and (c) The right to bring a civil action for a violation of the requirements of this Ordinance, including a covered employer's denial of premium pay as required by this Ordinance and a covered employer's or other person's retaliation against a grocery worker or other person for asserting the right to premium pay or otherwise engaging in an activity protected by this Ordinance. Covered employers shall post the notice of rights required in a conspicuous location, and in an electronic format that is readily accessible to the grocery workers, including smartphone application or online web portal. The notice shall be in English, Spanish, and any other primary language spoken by at least 10% of the employees of a covered employer's retail establishment.

E. RECORD KEEPING.

1. Covered employers shall retain records that document compliance with this Ordinance, including payroll records listing the premium pay required by this Ordinance as a separate item, for a period of two years.

2. If a covered employer fails to retain adequate records required herein, there shall be a presumption, rebuttable by clear and convincing evidence, that the covered employer violated this Ordinance for each grocery worker for whom records were not retained.

F. RETALIATION PROHIBITED. No covered employer shall discharge, reduce compensation for, or take any other adverse action against a grocery worker for opposing any practice proscribed by this Ordinance, for participating in proceedings related to this Ordinance, for seeking to exercise their rights under this Ordinance, or for otherwise asserting rights under this Ordinance. The protections of this Ordinance shall apply to any grocery worker who mistakenly, but in good faith, alleges non-compliance with this Ordinance.

G. VIOLATION. The failure of any person to comply with any requirement imposed on it under this Ordinance is a violation.

H. CIVIL ENFORCEMENT AND REMEDIES.

1. The remedies provided for in this Ordinance are cumulative and are not intended to be exclusive of any other available remedies, damages, penalties, fines, or relief.

2. Any grocery worker aggrieved by a violation of this Ordinance may bring a civil action in a court of competent jurisdiction against the covered employer or other person violating this Ordinance and, upon prevailing, shall be awarded reasonable attorneys' fees and costs and such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, the payment of any unpaid compensation due under this Ordinance plus interest, back pay, reinstatement, front pay in lieu of reinstatement, and rescission.

3. In addition to any other remedies set forth in this Ordinance, a person that acts with malice, fraud, or oppression in violating a grocery worker's rights shall be liable for exemplary damages in the amount of two times the monetary damages suffered by the aggrieved grocery worker.

I. ENCOURAGEMENT OF MORE GENEROUS POLICIES.

1. Nothing in this Ordinance shall be construed to discourage or prohibit a covered employer from the adoption or retention of premium pay policies more generous than the one required herein.

2. Nothing in this Ordinance shall be construed as diminishing the obligation of a covered employer to comply with any contract or other agreement providing more generous protections to a grocery worker than those required by this Ordinance.

SECTION 2. MINIMUM REQUIREMENTS. This Ordinance provides minimum requirements for premium pay while working for a covered employer and shall not be construed to preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for premium pay, or that extends other protections to grocery workers. Nothing in this Ordinance shall be interpreted or applied so as to create any power or duty in conflict with federal or state law. Nothing in this Ordinance shall be construed as restricting a grocery worker's right to pursue any other remedies at law or equity for violation of their rights.

SECTION 3. Emergency Declaration/Effective Date. The City Council declares this Ordinance to be an emergency measure necessary to protect the public peace, health, or safety, to take effect immediately upon adoption pursuant to California Government Code section 36934. The facts constituting the emergency are as follows: the City Council finds and determines there is an urgent need to adopt the provisions of this Ordinance in order to reduce the risk that higher risk grocery and retail drug workers will leave their employment due to lack of adequate compensation for taking on that additional risk. Requiring grocery stores to provide premium pay to grocery workers compensates grocery workers for the risks of working during a pandemic. Grocery workers face magnified risks of catching or spreading the COVID-19 disease because the nature of their work involves close contact with the public, including members of the public who are not showing symptoms of COVID-19 but who can spread the disease. The provision of premium pay better ensures the retention of these essential workers who are on the frontlines of this pandemic providing essential services and who are needed throughout the duration of the COVID-19 emergency. As such, they are deserving of fair and equitable compensation for their work. the current and immediate threats related to the COVID-19 virus and pandemic, as set forth in the Recitals

SECTION 4. Term. This Ordinance shall remain in effect for a period of 120 days after its adoption.

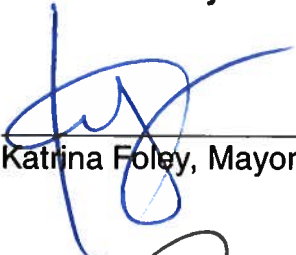
SECTION 5. Uncodified Ordinance. This Ordinance shall not be codified in the Costa Mesa Municipal Code.

Section 6. Inconsistencies. Any provision of the Costa Mesa Municipal Code or appendices thereto inconsistent with the provisions of the Ordinance, to the extent of such inconsistencies and no further, are suspended or modified to that extent necessary to affect the provisions of this Ordinance, but only during the term of this Ordinance.

Section 7. Severability. If any chapter, article, section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Ordinance, or the application thereof to any person, is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portion of this Ordinance or its application to other persons. The City Council hereby declares that it would have adopted this Ordinance and each chapter, article, section, subsection, subdivision, sentence, clause, phrase, word, or portion thereof, irrespective of the fact that any one or more subsections, subdivisions, sentences, clauses, phrases, or portions of the application thereof to any person, be declared invalid or unconstitutional. No portion of this Ordinance shall supersede any local, state, or federal law, regulation, or codes dealing with life safety factors.

SECTION 8. Certification. The City Clerk shall certify to the passage and adoption of this Ordinance as required by law.

PASSED, APPROVED AND ADOPTED this 16th day of March, 2021.

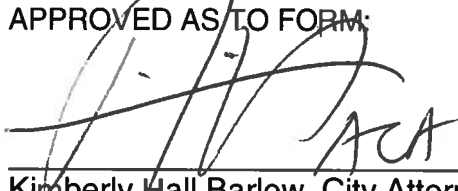


Katrina Foley, Mayor

ATTEST:



Brenda Green, City Clerk

APPROVED AS TO FORM:


Kimberly Hall Barlow, City Attorney

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss
CITY OF COSTA MESA)

I, **BRENDA GREEN**, City Clerk of the City of Costa Mesa, DO HEREBY CERTIFY that the above and foregoing Urgency Ordinance No. 2021-05 was duly adopted at a regular meeting of the City Council of the City of Costa Mesa held on the 16th day of March, 2021, by the following roll call vote, to wit:

AYES: COUNCILMEMBERS: CHAVEZ, GAMEROS, HARLAN, REYNOLDS, MARR,
AND FOLEY

NOES: COUNCILMEMBERS: HARPER

ABSENT: COUNCILMEMBERS: NONE

IN WITNESS WHEREOF, I have hereby set my hand and affixed the seal of the City of Costa Mesa this 17th day of March, 2021.



Brenda Green, City Clerk